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## Infrastructure Series: Fast-Tracking Electric Transmission Infrastructure

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*This is the third issue of WilmerHale's 10-in-10 Infrastructure Series. In this series, our attorneys will share insights on current and emerging issues affecting infrastructure project developers in the United States. Attorneys from across various practice groups at the firm will offer their take on issues ranging from permitting reform to financing to litigation and share their insights from working with clients in a variety of infrastructure sectors, from water infrastructure, to energy development, to infrastructure development on tribal lands. This client alert was also published by [Law360](#).*

In the coming weeks, the US Department of Energy is expected to undertake its fourth triennial congestion study. Depending on the outcome of that study, DOE may then designate one or more National Interest Electric Transmission Corridors (NIETCs). Electric transmission projects proposed within NIETCs may benefit from fast-tracked approval, as the Federal Energy Regulatory Commission (FERC) may step in if states hold back their permitting decisions for more than a year. In addition, project developers may exercise eminent domain power for FERC-permitted projects in NIETCs.

While no new NIETCs have been designated in more than a decade, the current political climate may make new designations more likely, given the Trump Administration's focus on infrastructure, streamlined permitting and domestic energy development. There will be significant opportunities for stakeholder involvement in this process, and entities with interests in transmission projects should be prepared to engage.

### **National Interest Electric Transmission Corridors**

The Energy Policy Act of 2005 (EPAc 2005) was a comprehensive energy reform bill that expanded the powers of DOE and FERC with regard to interstate electric transmission projects. Specifically, Section 1221 of the Act:

- required DOE to undertake a transmission congestion study every three years;
- authorized DOE to designate NIETCs, based on congestion studies, in “any geographic

area experiencing electric energy transmission capacity constraints or congestion that adversely affects consumers”; and

- created a fast-track approval process for electric transmission projects by (a) requiring all federal permits to site a transmission facility to be completed within one year, as a general rule; (b) giving FERC “backstop authority” to issue construction permits for projects in NIETCs if states withhold approval for more than a year; and (c) giving project developers eminent domain rights for FERC-permitted projects in NIETCs.

DOE's most recent congestion study was completed in 2015. DOE expects to begin the next congestion study in the coming weeks.

The congestion study will need to be prepared “in consultation with affected States,” as required by EPCA 2005. Previous NIETC designations have been invalidated due to inadequate consultation in that regard, so DOE is expected to engage in a robust consultation process while the congestion study is underway. See *California Wilderness Coalition v. U.S. Dep’t of Energy*, 631 F.3d 1072 (9th Cir. 2011).

The upcoming study process will launch with a public comment period, during which stakeholders will have the opportunity to provide input on electric transmission needs and related issues. In addition, affected entities can expect further opportunities to comment on any future NIETC designation, which is a major federal action under the National Environmental Policy Act (NEPA). See *id.*

### **Steps for Developers to Use Eminent Domain Authority**

There are several steps that must be taken in order for project developers to exercise eminent domain authority for electric transmission projects under Section 1221. First, DOE's upcoming congestion study must identify an area where congestion is considered to be a problem of national concern. Second, based on the congestion study, DOE must designate an NIETC covering the project developer's site. (Only two NIETCs have ever been designated, and both of those were vacated in *California Wilderness Coalition*; i.e., care must be taken in the foregoing steps to comply with that decision.) Then, the project developer must obtain a construction permit from FERC, which would be available only if state authorization is held back for more than a year. After obtaining that permit, if negotiations with landowners are not successful, the project developer would be able to acquire necessary rights-of-way for construction or modification by exercising eminent domain in the relevant federal district court or state court.

In light of the steps that must occur, any use of eminent domain for electric transmission projects is likely to be at least two years away. Designation of a new NIETC is unlikely to occur before 2019, following DOE's 2018 congestion study and the required NEPA process.

### **Takeaways**

- DOE is preparing to undertake its fourth triennial national congestion study. Stakeholders will have opportunities to provide input during the public comment period for the congestion study and any subsequent NEPA process triggered by a proposed NIETC designation.
- While NIETCs have not yet been used effectively to streamline permitting for electric

transmission projects, DOE could designate new NIETCs that are less vulnerable to challenge by ensuring that states are adequately consulted in the upcoming congestion study.

- The use of eminent domain authority under Section 1221 of EPCAct 2005 will require a multi-step process that includes DOE designation of a new NIETC, FERC approval for transmission projects, negotiations with landowners, and relevant court proceedings.
  - If a new NIETC is designated, it may take two years or longer before eminent domain power can be exercised, based on the milestones set forth in Section 1221.
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## *Authors*



**H. David Gold**

SPECIAL COUNSEL

✉ [david.gold@wilmerhale.com](mailto:david.gold@wilmerhale.com)

☎ +1 617 526 6425